



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Planning Research Corporation

File: B-237201; B-237201.3

Date: January 30, 1990

DIGEST

1. Protest that agency held discussions with awardee is denied because clauses included in final contract document, which protester contends indicate that discussions were held, did not affect the agency's assessment that awardee's proposal satisfied the requirements of the RFP.
2. Even if it is shown that discussions were held with any offeror other than the awardee, whether with the protester or other disappointed offeror, protester did not suffer any competitive prejudice since alleged discussions did not give awardee an unfair competitive advantage by permitting it to make its proposal acceptable or otherwise improve it.
3. Contracting agency did not abuse its discretion in proceeding with award on an initial proposal basis to the low offeror even though protester submitted a letter offering to reduce its costs. Agency was not required to conduct discussions as a result of protester's letter, which was submitted 4 months after initial proposals were received and just a few days before award was made, when the suggested reductions were not substantiated in the letter and the likelihood of significant reductions must be balanced against agency's interest in making a timely award without the time and expense of discussions.

DECISION

Planning Research Corporation (PRC), protests the award of a cost-plus-award-fee contract to Science Applications International Corporation (SAIC) under request for proposals (RFP) No. DAEA18-89-R-0002 issued by the Army for professional/technical services in support of the Army's Information Systems Engineering Command. PRC principally contends that the Army failed in its duty to hold meaningful discussions with it and improperly made award on the basis of initial proposals.

We deny the protest.

Under the solicitation, proposals were to be evaluated for technical merit, management approach and cost, with management and cost of equal weight and technical weighted significantly higher than either management or cost. In the technical and management evaluation areas, each proposal was to be assigned a numerical rating and an adjective rating (i.e., superior, very good, acceptable, marginal or unacceptable). The solicitation further provided that award could be made on the basis of initial proposals, without discussions.

Seven firms submitted proposals in response to the solicitation. Based on an evaluation of the technical and management proposals, the agency determined that six of the proposals were acceptable as submitted and the seventh proposal, that of PRC, was unacceptable, but susceptible to being made acceptable.^{1/} The Army reports that it also performed a cost evaluation of the proposals in accordance with the solicitation evaluation scheme, including a cost realism analysis and a determination of the most probable cost of each proposal. The agency determined that SAIC's proposal represented the lowest probable cost.

The Army decided to make award based on initial proposals to SAIC, the technically acceptable offeror whose proposal represented the lowest overall cost to the government. The Army awarded the contract to SAIC on September 21. PRC protested to this Office on September 29, October 2, and October 20.

PRC raises a number of arguments against the award to SAIC. Its main complaint is that the agency in fact conducted discussions with the awardee and others so that it could not properly make award based on initial proposals. The protester also argues that the agency did not make award at the lowest possible cost because the protester's offer to reduce its cost by \$3 million was ignored and the award to SAIC was based on proposed rather than evaluated costs.

^{1/} The Army reports that PRC's proposal was unacceptable because it did not include a "Sensitivity of Fee for Performance" document which was to include the percentage of award fee to be earned by PRC for various levels of performance. In its award selection the agency considered PRC's proposal with all the others as if it was acceptable.

Further in this connection, PRC states that SAIC's cost estimate was improperly based on the use of uncompensated overtime.

Specifically, PRC argues that the agency improperly made award on an initial proposal basis because it conducted negotiations with SAIC, Federal Electric Corporation (FEC)--an unsuccessful offeror--and with PRC itself. As far as the alleged discussions with the awardee are concerned, PRC points out that the SAIC contract includes three clauses that were not in the RFP. First, the SAIC contract includes by reference the clause set forth at Federal Acquisition Regulation (FAR) § 52.219-16 which states that the contractor will be required to pay liquidated damages for its failure to follow its approved small business subcontracting plan. Second, the Army added the clause at FAR § 52.203-10 which allows the government to reduce the total fee under the contract in the event of a violation of the procurement integrity provisions of subsection 27(a) of the Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, 101 Stat. 4055 (1988), which prohibited certain activities by government officials and competing contractors during the course of a federal procurement.^{2/} Finally, the SAIC contract includes an organizational conflict of interest provision from SAIC's proposal that differed from the clause in the RFP.

PRC argues that the Army's inclusion of the liquidated damages and procurement integrity clauses in the contract increased the risk assumed by the contractor and changed the legal obligations of the parties to the contract, and that those changes plus the Army's acceptance of SAIC's proposed organizational conflict of interest provision amounted to negotiations with SAIC.

Under the Competition in Contracting Act of 1984 (CICA) 10 U.S.C. § 2305(b)(4)(A)(ii) (1988) and FAR § 15.610(a)(3), an agency may award a contract on the basis of initial proposals without holding discussions if the solicitation advised offerors of that possibility, no discussions in fact are held, and the competition or prior cost experience clearly demonstrates that the acceptance of initial proposals will result in the lowest overall cost to the government. Once an agency holds discussions with any offeror, however, it must do so with all offerors in the

^{2/} The procurement integrity provisions were suspended for 1 year as of December 1, 1989 by section 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1759 (1989).

competitive range. FAR § 15.610(b). On the other hand, an agency may permit an offeror to clarify an otherwise acceptable offer without holding discussions with the other offerors. Concord Electric Co., B-230675, May 25, 1988, 88-1 CPD ¶ 501. Discussions encompass any oral or written communications between the government and an offeror that solicit information essential for determining if a proposal is acceptable or which provide the offeror the opportunity to modify its proposal. Id.

In our view, the clauses in the SAIC contract referred to by PRC do not indicate that the Army held discussions with SAIC. First, with respect to the organizational conflict of interest provision, the solicitation allowed offerors to propose alternatives to the standard organizational conflict of interest prohibition, such as a management arrangement which insulates from the contract those parts of the firm with a potential conflict.^{3/} In this case, SAIC's proposal included such an alternative and the record indicates that the Army accepted that alternative as proposed by SAIC. The record also indicates that the liquidated damages and procurement integrity clauses were included by the Army in the contract because they were required by statute but had been inadvertently left out of the solicitation.

Further, according to the agency, SAIC's conflict provision and the two clauses were incorporated into the contract without any negotiations with SAIC concerning their terms or conditions. It is clear in our view that the Army would have had to include the liquidated damages and procurement integrity clauses in a contract with any awardee. As far as the conflict proposal was concerned, it was solicited by the RFP and all the agency did was accept it as it was entitled to. See Concord Electric Co., B-230675, supra. Moreover, the agency had determined that SAIC's proposal was acceptable before adding the two clauses and the conflict provision to the final contract document. Thus, they did not affect the Army's assessment that SAIC's proposal satisfied the requirements of the RFP and the Army's inclusion of the clauses and the conflict provision did not amount to discussions with SAIC. See IBIS Corp., B-224542, Feb. 9, 1987, 87-1 CPD ¶ 136. Therefore, these additions to the SAIC contract did not bar the agency from making award

^{3/} The solicitation in essence provided that where a contractor provides systems engineering and technical direction for a system but does not have overall responsibility for the system, it cannot receive a contract to supply the system or its major components.

to SAIC on an initial proposal basis and without holding discussions with the protester. Concord Electric Co., B-230675, supra.

Nevertheless, PRC further argues that discussions were held with FEC concerning alleged mistakes in its cost proposal, a change in its proposed level-of-effort and the firm's failure to complete some required RFP certifications. Similarly, the protester maintains that discussions, albeit not meaningful ones, were held with it concerning the omission of several required standard certifications and clauses. It is PRC's view that because of these discussions, under the RFP's evaluation scheme, the Army could not make award allegedly on an initial proposal basis to SAIC as the low cost technically acceptable offeror. In this connection, the protester points out that under section M.9, "Basis for Award," the solicitation included the following provision:

"a. IF DISCUSSIONS ARE NOT HELD, award will be made to that acceptable proposal which would result in the lowest overall cost to the Government.

b. IF DISCUSSIONS ARE REQUIRED, basis for award shall be that acceptable offer whose evaluated total cost is not necessarily the lowest, but which is sufficiently advantageous to justify payment of additional amounts."

The protester maintains that this clause provided alternative bases for award, depending on whether or not discussions were held. According to PRC, had the Army made award here based on the second alternative, which PRC argues it was required to do because of the presence of discussions, its technically superior, higher cost proposal would have been in line for award.

We do not agree with PRC's reading of the award scheme set out in the solicitation. In our view, the clause referred to by PRC is basically a restatement of the express statutory requirement of CICA, 10 U.S.C. § 2305(b)(4)(A)(ii), that a contracting agency may make an award on the basis of initial proposals where the solicitation advises offerors of that possibility, only if the competition or prior cost experience clearly demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government. See Sperry Corp., 65 Comp. Gen. 195 (1986), 86-1 CPD ¶ 28. It also provides for discussions, if warranted.

Our examination of the evaluation documents shows that all of the proposals except one were rated "very good" technically and all were rated at least "very good" in the management area. Since the record indicates that the proposals were essentially equal from a technical and management standpoint, and the agency determined that the awardee's proposal would result in the lowest overall cost to the government, we have no basis to object to the award to SAIC on an initial proposal basis.

Moreover, since we conclude that there was no "special" provision in the RFP concerning discussions, it is our view that even if it could be shown that discussions were held--which the agency denies--with any offeror other than SAIC, whether it be the protester or another unsuccessful offeror, we do not believe that the protester suffered any competitive prejudice in the sense that it was treated unfairly vis-a-vis the awardee. See Southwestern Bell Telephone Co., et al., B-200523.3 et al., Mar. 5, 1982, 82-1 CPD ¶ 203. In sum, since the alleged discussions did not give the awardee an unfair advantage by permitting it to make its proposal acceptable or to otherwise improve it, they were legally irrelevant as far as the protester is concerned and we will not consider the matter.

In addition, PRC argues that since before the award to SAIC it offered in a September 14 letter to the contracting officer to "fine-tune" its cost proposal resulting in a cost reduction of up to \$3 million, the agency was compelled to hold discussions with it and to request a best and final offer. PRC states that the September 14 letter clearly put the Army on notice that the initial proposals would not result in an award based on the lowest overall cost.

We recognize that there may be circumstances where an offered reduction in cost so closely follows the receipt of initial offers and would confer such a substantial benefit to the government that it would be tantamount to an abuse of discretion not to ask for best and final offers in order to take advantage of it. Microcom Corp., B-225140.2, Mar. 18, 1987, 87-1 CPD ¶ 301. Here, however, although PRC listed general areas of its proposal in which it could achieve cost reductions, the September 14 letter, which was submitted almost 4 months after initial proposals were received and just a few days before award was made, did not substantiate in any detail how those reductions would be achieved and in fact seemed to be tied to a threat to protest if award was made on the basis of initial proposals. Thus, the likelihood of significant reductions appears speculative. Further, when the possibility of significant reductions is balanced against the agency's competing interest in making a

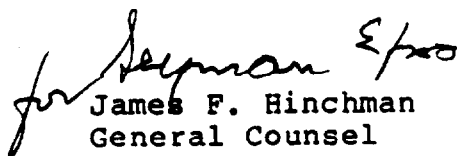
timely award without the time and expense of negotiations, we do not think that the Army abused its discretion in making award here based on SAIC's initial proposal. See Microphor, Inc., B-224264, Feb. 11, 1987, 87-1 CPD ¶ 148.

PRC also argues that the Army awarded the contract based on the offerors' estimated costs rather than the agency's evaluation of the proposal costs as required by FAR § 15.605(d). In our view, this is essentially an allegation that the Army failed to conduct a cost realism analysis of SAIC's proposal. The record shows that this is simply not true. The agency states that it conducted a cost realism analysis and awarded the contract based on evaluated costs. The record includes a detailed analysis of each offeror's proposed costs and the agency's determination of most probable cost for each offeror. Based on its lowest evaluated cost, the agency determined that a contract with SAIC would result in the lowest overall cost to the government. There is no support in the record for PRC's contention that award was based on estimated costs instead of evaluated cost.

The protester also argues that the Army failed to properly evaluate SAIC's proposal for the use of uncompensated overtime as required by the solicitation and, although SAIC used uncompensated overtime in its proposal, this fact was not discovered by the Army.

In response, the agency states that there is no indication that SAIC used uncompensated overtime in its proposal. Further, the Army submitted a letter in which SAIC asserts that it did not use uncompensated overtime in its proposal but based its proposal on its normal 40-hour work week. In its comments in response to the Army's report on this issue, PRC furnished no evidence or argument to rebut the Army's position. We therefore have no basis to further consider the protester's speculation in this regard. IPEC Advanced Sys., B-232145, Oct. 20, 1988, 88-2 CPD ¶ 380.

The protest is denied.


James F. Hinchman
General Counsel